Supreme Court, U.S.
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No.03-170

In The
Supreme Court of the United States

VINCENT MARQUEZ, *Petitioner,*

v.

R. J. GUTIERREZ, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Ninth Circuit found that a correctional officer who shot a prisoner in the leg during a prison fight was entitled to qualified immunity because he could reasonably believe that his conduct did not violate clearly established law. The question presented is:

Did the Ninth Circuit correctly apply the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001)?

STATEMENT OF THE CASE

This case stems from a melee on a California prison exercise yard during which inmate Vincent Marquez was shot and wounded by Officer Gutierrez. The Ninth Circuit granted Officer Gutierrez qualified immunity, finding that he could have reasonably believed his actions were lawful. Petitioner now challenges the applicability of qualified immunity in an excessive force case when a court has found that a constitutional violation occurred.

The melee occurred when Vincent Marquez, 200 to 300 other inmates, and two or three officers were on an exercise yard at the California State Prison in Sacramento. A group of inmates approached Marquez and the inmates with whom he was standing. ER 379. A fight then ensued between about ten inmates from rival Hispanic groups, none of whom had weapons. Marquez was in the middle of the brawl, with groups of inmates fighting around him. Although he alleged in his complaint that he fought back, he later testified that he defended himself by blocking the blows of inmates who came toward him and by trying to move away from the fights; he did not hit or kick anyone during the altercation. ER 54; 384.

Officer Gutierrez was in a guard tower 360 feet away on the opposite side of the yard when he saw the fight and yelled for the inmates to get down on the yard. Another officer was about 100 yards away when he heard Officer Gutierrez's order and began running toward the altercation, also yelling for the inmates to get down. A third officer on the yard responded and ordered inmates to get down. The inmates did not obey the officers' orders and the fight continued. ER 386.

Officer Gutierrez then got his rifle from a gun rack and again yelled for the inmates to get down. The inmates on the yard, except for those where the fight was happening, got on the ground. ER 385. Officer Gutierrez focused on three inmates, one of whom–an inmate later identified as Perez–was on the ground. Officer Gutierrez saw an inmate whose back was to him making what he believed were kicking motions toward Perez's head and upper body. Another inmate was doing the same toward Perez's lower body. Perez's body was moving with the blows and Officer Gutierrez did not believe that Perez was defending himself, although Perez later said he was either on the ground trying to ward off the blows or trying to get to his knees.

Officer Gutierrez felt that if the attack continued, Perez could be killed or seriously injured. In a previous unrelated incident, Officer Gutierrez had seen an inmate's jaw broken with a single kick. He decided to fire a shot at the lower body of the inmate closest to Perez, who was kicking Perez in the head, because he thought that inmate was the greatest threat. The shot struck Marquez in the left leg, fracturing his femur. Another inmate, Garcia, later said that he was one of the inmates Officer Gutierrez saw kicking Perez, but that Marquez was not involved. ER 385-86.

Before the shot was fired, Marquez had heard officers order the inmates to get down at least twice. He was within three to four yards of Perez at the time the shot was fired. Marquez gave two accounts of his actions just before the shot was fired. In one, he claimed that he was trying to get on the ground as ordered, when he tripped over another inmate's head and was shot while falling to the ground. In the other, he claimed he was moving around on his knees trying to get away from the fights when he was shot. Marquez said he was

in the "wrong place at the wrong time," and just happened to be the inmate that was hit. He did not know whether Officer Gutierrez was trying to kill or hurt someone, or simply trying to break up the fight, when the shot was fired. ER 70-73.

All but two of the inmates stopped fighting and got on the ground when the shot was fired. The other two continued to fight for a brief time before complying with the orders of other officers who were just arriving at the location of the fight. ER 72.

Marquez was found on the ground near Perez and Garcia. Perez suffered contusions of the lower lip, chin, back of the neck, and abrasions to both elbows. ER 223; 214.

The Ninth Circuit determined that Officer Gutierrez was entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194 (2001), and Ninth Circuit precedent of *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001), because a reasonable officer in his position could have believed that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good-faith effort to restore order. *Marquez v. Gutierrez*, 322 F.3d 689, 693 (9th Cir. 2003).

REASONS FOR DENYING THE PETITION

I.

THERE IS NO CIRCUIT SPLIT ON THE AVAILABILITY OF QUALIFIED IMMUNITY IN EIGHTH AMENDMENT EXCESSIVE FORCE CASES, AND THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioner argues that there is a circuit split on the availability of qualified immunity in Eighth Amendment excessive force cases and that the Ninth Circuit's decision in this case is inconsistent with this Court's decisions on qualified immunity. There is no circuit split because the Eleventh Circuit cases that petitioner cites as creating one were decided before this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), which provided direction to that circuit on the qualified immunity issue. And the Ninth Circuit is not in conflict with this Court because it correctly applied the test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), by separating the qualified immunity inquiry into two parts and not ending the analysis after it found a constitutional violation.

In ruling on qualified immunity a court must consider the threshold question of whether the facts, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201. The Ninth Circuit followed that precedent and first analyzed whether Gutierrez violated the Eighth Amendment by using excessive force. *Marquez*, 322 F.3d at 692. In doing so, it properly applied the test established in *Whitley v. Albers*, 475 U.S. 312 (1986). Under that test,

where a prison security measure is undertaken to resolve a disturbance and poses significant risks to the safety of inmates and prison staff, the question of whether the measure violates the Eighth Amendment's prohibition on cruel and unusual punishment turns on whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. *Whitley*, 475 U.S. at 320-21.

The Ninth Circuit found that, on his version of the facts, Marquez could show an Eighth Amendment violation. *Marquez*, 322 F.3d at 692. Petitioner argues that once a court makes that finding, qualified immunity is not available in excessive force cases under the Eighth Amendment because, under *Whitley*, that finding necessarily forecloses a finding that an officer could reasonably believe that his conduct did not violate clearly established law. This is the same argument this Court considered and rejected in *Saucier*. Even if a court were to hold that an officer violated the Fourth Amendment by using unreasonable–and therefore excessive–force, the officer would still be entitled to qualified immunity for a reasonable mistake as to the legality of his action. *Saucier*, 533 U.S. at 206.

Petitioner argues, citing *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002) and *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002), that *Saucier* is distinguishable because it involved an excessive force claim under the Fourth Amendment's objective test for reasonableness, rather than the Eighth Amendment's test which contains a subjective element of intent. Petitioner's argument fails because both *Johnson* and *Skrtich* were decided before, and without the benefit of, this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In that case, this Court held that despite their participation in

conduct deliberately indifferent to a prisoner's safety under the Eighth Amendment, officers "may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope*, 536 U.S. at 738-39 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Following *Hope*, the Ninth Circuit has held that even though the constitutional issue turned on the officer's state of mind, the court still had to consider whether, assuming the undisputed facts in the party's favor, it would be clear to a reasonable officer that his conduct was unlawful. *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002). This is as true for Eighth Amendment cases as for Fourth Amendment cases. *Id.* at 1049 (citing *Hope*, 536 U.S. at 735-41). To the extent that *Johnson* and *Skrtich* are inconsistent with *Hope*, they are no longer good law.

Moreover, the Eleventh Circuit acknowledged that *Hope* changed the law in that circuit. *Willingham v. Loughnan*, 321 F.3d 1299, 1300 n.1 (11th Cir. 2003). Respondent has found no post-*Hope* cases in the Eleventh Circuit that hold that qualified immunity is not available in excessive force actions under the Eighth Amendment, and petitioner concedes that no other circuits have reached that conclusion.

The Ninth Circuit correctly decided that qualified immunity is available in Eighth Amendment excessive force cases, even if the facts construed in the light most favorable to the injured party are sufficient to show a violation. There is no conflict in the circuits on that question.

II.

THE NINTH CIRCUIT PROPERLY APPLIED *SAUCIER* BY ANALYZING HOW A REASONABLE OFFICER COULD HAVE PERCEIVED THE PRISON DISTURBANCE AND THE APPLICABLE LAW

Petitioner argues that if a court assumes the facts in the light most favorable to the plaintiff and finds that an officer's conduct was malicious and sadistic, it is inconsistent to then grant qualified immunity because it would never be reasonable for an officer to act maliciously and sadistically. That argument ignores that the second *Saucier* inquiry–whether under clearly established law an officer could believe his conduct was lawful–must be viewed from a reasonable officer's perspective of the situation that confronted him at the time. How the officer perceived the situation at hand necessarily influences the officer's belief as to the lawfulness of his conduct.

The Ninth Circuit did not "recast" the facts, as petitioner argues, rather it determined whether a reasonable officer in the circumstances facing Officer Gutierrez would have known that shooting Marquez violated clearly established law. *Marquez*, 322 F.3d at 693. It is undisputed in this case that the officer was approximately 360 feet away from the multiple fights, that numerous inmates were involved, and that at least one inmate was kicking another inmate. ER 386; Pet. at 3. As the Ninth Circuit correctly pointed out, even if the officer's beliefs as to the dangerousness of the situation were mistaken, he can still be entitled to qualified immunity if a reasonable officer in his situation could have believed that force was necessary and, therefore, lawful.

And contrary to petitioner's argument, the Ninth Circuit was more than generous in the facts it construed in plaintiff's favor. In fact, it is doubtful that an excessive force claim under the Eighth Amendment was made out at all because the facts are remarkably similar to *Whitley*, and there is virtually a complete absence of facts to support an inference that the shot was fired maliciously and sadistically to cause harm, rather than in a good-faith effort to restore discipline during a prison disturbance.

In *Whitley*, this Court found that defendant was entitled to qualified immunity where, during a prison disturbance, he told other officers to shoot low at any prisoner climbing the stairs after him, as he went up to rescue a hostage. *Whitley*, 475 U.S. at 322-26. A warning shot was fired, but a group of inmates did not get down and instead ran up the stairs after the officer. *Id.* An officer then shot low into the group and hit an inmate in the leg even though it later became apparent that the inmate was not actively involved in the riot, but was simply trying to get back to his cell. *Id.*

Here, the Ninth Circuit nevertheless found that petitioner could make out an excessive force claim because he allegedly was passive and unarmed and merely standing near a fight between other unarmed inmates when no inmate was in danger of great bodily harm.

Under *Whitley*, however, and the Ninth Circuit's own precedent in *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001), a reasonable officer in Gutierrez's position could believe that his conduct did not violate clearly established law. *Marquez*, 322 F.3d at 693. In *Jeffers*, a racial disturbance broke out between Hispanic and Black inmates at the same prison and on the same exercise yard as in *Marquez*. *Jeffers*, 267 F.3d at

901. Jeffers was attacked by another inmate with a knife-like weapon during the disturbance. *Id.* at 912. While he was defending himself, he was unintentionally hit by a shot fired by officers attempting to control the disturbance. *Id.* Plaintiff himself believed that he was not shot intentionally. *Id.* Citing *Whitley*, the *Jeffers* court found that the officers' actions in firing their guns in plaintiff's vicinity were good-faith efforts to restore discipline, rather than malicious and sadistic acts. *Id.*

In *Marquez*, the Ninth Circuit found that Officer Gutierrez could have reasonably concluded that his decision to shoot an inmate in the leg to stop an assault that could have seriously injured or killed another was a good-faith effort to restore order, even if, in hindsight, he was mistaken regarding Marquez's involvement and the degree of the danger to Perez. *Marquez*, 322 F.3d at 693. That conclusion is consistent with this Court's decisions on qualified immunity and is not in conflict with the law in another circuit.

An Eighth Amendment violation was not obvious, and *Whitley* and *Jeffers* did not provide fair warning to Officer Gutierrez that his decision to shoot in the circumstances facing him was unlawful. *See Hope*, 536 U.S. 738-45. The Ninth Circuit's grant of qualified immunity, therefore, was correct.

CONCLUSION

This Court should deny the petition for certiorari because there is no conflict in the circuits and the Ninth Circuit's decision is consistent with this Court's precedent.

Respectfully submitted,

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